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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JEFF GRIFFIN

PETITIONER

v.

THURSTON COUNTY
AND ITS BOARD OF HEALTH

RESPONDENT,

SUPPLEMENTAL BRIEF OF PETITIONER JEFF GRIFFIN

OWENS DAVIES, P.S.
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I. TABLE OF CONTENTS

INTRODUCTION	1
ISSUE PRESENTED FOR REVIEW; ASSIGNMENT OF ERROR	1
STATEMENT OF THE CASE.....	2
A. <u>Statutory Background</u>	2
B. <u>Thurston County Health Department Issues Mr. Griffin His Septic Permit</u>	4
C. <u>Board of Health Hearing</u>	5
D. <u>Board of Health 2-1 Decision</u>	6
E. <u>Superior Court Decision</u>	7
F. <u>Court of Appeals Decision</u>	7
G. <u>Petition for Review Granted</u>	8
<u>STANDARD OF REVIEW</u>	8
<u>ARGUMENT</u>	9
A. <u>A Septic Permit Applicant Who Utilizes Alternative Setback and Similar Standards as Specifically Authorized by the Code Meets “All Requirements” of the Code</u>	9
B. <u>The Phrase “All Requirements” Has Independent Meaning</u>	12
<u>CONCLUSION</u>	13
<u>APPENDICES</u>	15

II. TABLE OF AUTHORITIES

Cases

<i>Burien Bark Supply v. King County</i> , 106 Wn.2d 868, 871, 725 P.2d 994 (1986)	11
<i>City of SeaTac v. Casson</i> , 93 Wn.App. 357, 363, 967 P.2d 1274 (1998).....	4
<i>Crescent Convalescent Ctr. v. Department of Social and Health Services</i> , 87 Wn.App. 353, 357-58, 942 P.2d 981 (1997)	8
<i>Ford Motor Co. v. City of Seattle, Executive Services Dept.</i> , 150 Wn.2d 32, 41 ¶ 14, 156 P.3d 185 (2007).....	8
<i>In re J.M.K.</i> , 155 Wn.2d 374, 387 ¶ 23, 119 P.3d 840 (2005).....	9
<i>McGinnis v. State</i> , 152 Wn.2d 639, 645, 99 P.3d 1240 (2004)	8
<i>Parkridge Associates, Ltd. v. Ledcor Industries, Inc.</i> , 113 Wn.App. 592, 602, 54 P.3d 225 (2002).....	9
<i>Russell v. Department of Human Rights</i> , 70 Wn.App. 408, 412, 854 P.2d 1087 (1993), review denied, 123 Wn.2d 1011 (1994).....	8
<i>Sleasman v. City of Lacey</i> , 159 Wn.2d 639, 641 ¶ 7, 151 P.3d 990 (2007).....	9
<i>Sleasman v. City of Lacey</i> , 159 Wn.2d 639, 646 ¶ 14, 151 P.3d 990 (2007).....	8
<i>State ex rel. Ogden v. City of Bellevue</i> , 45 Wn.2d 492, 495, 275 P.2d 899 (1954)	11
<i>Thurston County v. Griffin</i> , 137 Wn.App. 609, 618 ¶17, 154 P.3d 296 (2007)	8
<i>Thurston County v. Griffin</i> , 137 Wn.App. 609, 615, ¶ 6, 154 P.3d 296 (2007)	3
<i>Thurston County v. Griffin</i> , 137 Wn.App. at 618 ¶ 17	12

Statutes

Chapter 246-272 WAC	2
Chapter 246-272A WAC	2
WAC 246-272-09001(3)(a)	2
WAC 246-272-09501, Table 1, footnote 4	3

WAC 246-272-09501, Table 1, footnote 6	3
WAC 246-272-11001(3)	3
WAC 246-272-11001(4)	2
WAC 246-272-11501(2)(c)(i)	2
WAC 246-272-25001	13
Code § 21.4.5.3	9
Code, § 10.1, footnote 4	3
Code, § 10.3	1, 3
Code, § 11.4	2
Code, § 12.2.3.1	2
Code, § 21.4.5.3	1
Code, § 9.3	2
Code, §10.1	3

Citations to the Record

AR 1-2	5
AR 3	1, 5, 6, 7, 9, 12, 16
AR 1-4	6
AR 14-16	4
AR 16	5
AR 123	6
AR 337-87	5
AR 339-41	5
AR 341	3, 11
AR 355	4
AR 8-12, 237-78, 339-341	4

AR 8-12, 339-341	3, 5
CP 199.....	7

III. INTRODUCTION

Jeff Griffin submits this supplemental brief.

IV. ISSUE PRESENTED FOR REVIEW; ASSIGNMENT OF ERROR

The Thurston County Sanitary Code (“Code”) requires septic permit applicants to meet various setback and other standards. The Code explicitly authorizes permit applicants who meet specified criteria to utilize alternative setbacks and other alternative standards.

For example, the Code generally requires that septic drainfields be located at least 100 feet from open water. However, if the applicant proposes a septic system that provides for “enhanced treatment performance” as defined by the Code, the Code explicitly authorizes a reduced setback of 75 feet. Code, § 10.3.

The Code also explicitly authorizes the issuance of septic permits for small lots that were legally created in the past, but which are smaller than could be created today. The Code requires an applicant for a septic permit for a small lot to satisfy “all requirements of these regulations other than minimum land area.” Code, § 21.4.5.3.

Issue: Does a small-lot owner who utilizes and meets alternative setback and other alternative standards as specifically provided for in the Code satisfy “all requirements of these regulations other than minimum land area?”

Answer: A permit applicant who satisfies the criteria for utilizing alternative setbacks and other standards as explicitly provided for in the Code satisfies “all requirements” of the Code. The two members of the Thurston County Board of Health who voted to deny Mr. Griffin’s permit erred in concluding otherwise. AR 3 (Conclusions of Law 6-7).

V. STATEMENT OF THE CASE

A. **Statutory Background.** Thurston County's Sanitary Code governs the issuance of septic permits. Thurston County based its Sanitary Code on regulations published by the State Department of Health. Former Chapter 246-272 WAC.¹

The Code contains standards and requirements that any applicant must meet in order to obtain a septic permit. The Code provides that the County "shall" issue septic permits to applicants who meet these standards and requirements. Code, § 9.3. See also WAC 246-272-09001(3)(a).

On its face, the Sanitary Code frequently authorizes applicants who meet stated criteria to utilize alternative standards or requirements. For example, the Code generally requires a septic system to be designed for a flow of 120 gallons per bedroom per day with a minimum of 240 gallons per day. However, if technical justification is provided, the Code authorizes the utilization of a lower design flow. Code, § 12.2.3.1. See also WAC 246-272-11501(2)(c)(i). The Code also requires permit applicants either to perform a winter water table evaluation or to provide other soil and site information to show that groundwater will not rise into the area in which the effluent is to be discharged. Code, § 11.4. See also WAC 246-272-11001(4).

The Code requires a 10-foot setback from pressurized water supply lines, but provides for reduced setback if the applicant constructs the water line in accordance with

¹ The Department of Health issued updated regulations in 2007, which are codified at Chapter 246-272A WAC. All references in this brief are to the version of the regulations in effect in 2004-05, when Mr. Griffin applied for and was issued his permit.

specific criteria published by the Department of Ecology. Code, § 10.1, footnote 4. See WAC 246-272-09501, Table 1, footnote 4. The Code requires a 5-foot setback from the septic field to a property line or building foundation, but allows for a setback of two feet where the property line or building foundation is upgradient. Code, §10.1. See WAC 246-272-09501, Table 1, footnote 6. Finally, the Code requires a 100-foot setback from Puget Sound, but authorizes a 75-foot setback where the septic system provides for “enhanced treatment” of sewage. Code, § 10.3. See WAC 246-272-11001(3).

These alternative standards reflect a legislative judgment, made when the State Department of Health adopted its minimum standards, that compliance with either of the standards adequately protects public health and the environment. In light of this, Thurston County interprets its Code to entitle any septic permit applicant who meets these standards, including either of any alternative setbacks and other alternative standards, to approval of its septic application as a matter of right. AR 8-12, 339-341²

Finally, the Code contains special requirements applicable only to small lots. In order to obtain a septic permit for a small lot, the applicant must show:

² As Environmental Health Officer Steve Peterson testified:

All the setback reductions and the waivers are allowable under the Code, historically the Department has allowed those on existing lots of record. Staff then made the determination that it did meet the minimum requirements set forth in the regulations amid the determination to approve the design.

AR 341.

The County has consistently taken this position even though the Code provides that the Health officer “may” authorize the use of alternative setbacks and similar standards. The County has interpreted the word “may” in light of § 9.3’s overarching requirement that the County “shall” issue septic permits to those qualified for them. In other words, the County “shall” issue a septic permit whenever the Code states that it “may” do so. The Court of Appeals expressly so recognized. See Thurston County v. Griffin, 137 Wn.App. 609, 615, ¶ 6, 154 P.3d 296 (2007).

- 21.4.5.1 The lot is registered as a legal lot of record created prior to January 1, 1995; and
- 21.4.5.2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection; and
- 21.4.5.3 The proposed system meets all requirements of these regulations other than minimum land area.

Again, Thurston County copied these requirements directly from the regulations promulgated by the State Department of Health. See WAC 246-272-20501(5)(e).

B. Thurston County Health Department Issues Mr. Griffin His Septic Permit. In 2003, Jeff Griffin purchased a small undeveloped waterfront lot on Steamboat Island. Mr. Griffin purchased the lot intending to build a one-bedroom house where he and his wife could retire. AR 355.³

In 2004, Mr. Griffin submitted a septic permit application to the Thurston County Environmental Health Department. AR 14-16. Mr. Griffin's application utilized alternative setbacks and other standards in exactly the manner explicitly authorized by the Code. The Health Department determined that Mr. Griffin's application complied, in every respect, with the Code. See AR 339-41.

³ Respondents may assert that Mr. Griffin "knew" when he purchased his lot that he could not obtain a septic permit for it.

In acting upon Mr. Griffin's permit application, the Thurston County Board of Health did NOT find that Mr. Griffin, when he purchased his lot, somehow "knew" that he could not obtain a septic permit for it. Therefore, it would be wholly improper for the respondents to assert this as a "fact," or urge this Court to base its decision in any way upon this supposed "fact." *City of SeaTac v. Casson*, 93 Wn.App. 357, 363, 967 P.2d 1274 (1998).

Mr. Griffin submitted a septic application that fully complied with all specific requirements of the Code. County staff, applying the Code as the County had consistently interpreted and applied it up to that time, issued Mr. Griffin's permit. AR 8-12, 237-78, 339-341. Mr. Griffin did not knowingly invest his retirement savings in an unbuildable lot.

Because Mr. Griffin was applying for a septic permit for a small lot, the Health Department also reviewed his application pursuant to § 21.4.5. The Department determined that: (1) Mr. Griffin's lot had been legally created before 1995; (2) the County had not designated Steamboat Island as an area of special concern; and (3) Mr. Griffin's application met all the requirements of the Code other than minimum lot size. Therefore, the Health Department issued Mr. Griffin his septic permit. AR 16.

C. Board of Health Hearing. Bruce Carter, Mr. Griffin's neighbor, appealed. After an administrative process, the Thurston County Board of Health held a hearing at which it reviewed the permit decision *de novo*. AR 337-87.

At the hearing, Thurston County Health Department staff submitted a report and testified, without contradiction, that to the extent Mr. Griffin's application utilized alternative setbacks and other alternative standards, Mr. Griffin had satisfied the criteria articulated on the face of the Code authorizing him to utilize them. AR 8-12, 339-341. The Board of Health agreed that Mr. Griffin had satisfied the specific criteria the Code articulated as authorizing the use of these alternatives. AR 1-2 (Findings of Fact 5-10) (Describing the standards and criteria for utilizing them); AR 3 (Conclusion of Law No. 4) ("[T]he Griffins did what the Department required of them to obtain the waivers and modified setbacks required").

At the hearing, Mr. Griffin also submitted the report and testimony of his engineer. Mr. Griffin's engineer concluded that Mr. Griffin's proposed state-of-the-art septic system provided more than adequate protection to Puget Sound and would not

jeopardize public health. AR 123. The Board of Health agreed that Mr. Griffin's proposed septic system posed no increased risk to public health. AR 3 (Finding of Fact 15) (Finding that Mr. Griffin had "presented wastewater flow report evidence and testimony from . . . a local and reputable soils engineering firm, as well as testimony from . . . and a report submitted by Pacific Soils and Water"); (Conclusion of Law 5) (Concluding "[t]hat no scientific evidence has been submitted to refute the findings of the soils or wastewater flow reports submitted by Griffin").

Finally, Health Department staff testified that if the Board changed the County's interpretation of § 21.4.5.3 to preclude his utilization of the alternative standards, Mr. Griffin would not be able to obtain a septic permit for his lot. AR 12 (Thurston County Environmental Health Staff Report) ("If the applicant is required to meet all minimum requirements of Article IV without obtaining any waivers or setback reductions, it is unlikely that the health officer will be able to issue a sewage system permit for installation of a system on the Griffin property.)"

D. Board of Health 2-1 Decision.

Nevertheless the Board, by a 2-1 vote, denied Mr. Griffin's application. AR 1-4.

The two members who voted to deny Mr. Griffin's application held that the sole "issue for the Board to determine" was one of statutory construction: Whether Mr. Griffin's "application has met all other requirements other [sic] than minimum land area as required by § 21.4.5.3." AR 3 (Conclusion of Law 6). The two members of the Board who voted to deny the permit interpreted § 21.4.5.3 as requiring Mr. Griffin's

proposed septic system to satisfy all the requirements of the Sanitary Code without having to resort to what these two members described as “waivers, setback adjustments, or *other modification of the rules* found within the Code.” *Id.* (Conclusion of Law 7) (emphasis added).

E. Superior Court Decision

The Superior Court reversed the Board of Health decision. The Superior Court held that:

I do not find that the term “all requirements” means requirements without waiver. A requirement is a specific standard, and often for standards to apply there may be exceptions. A requirement or rule may still be met if there is an exception to the standard.

Report of Proceedings, at 5. The Superior Court ordered the Board to issue Mr. Griffin’s permit. CP 199.

F. Court of Appeals Decision

The Court of Appeals reversed the Superior Court. Using reasoning that had not been adopted by the Board of Health, and that never had been articulated by Respondents, the Court of Appeals held:

[T]he “all requirements” portion of the ordinance at issue here cannot include “requirements” that have been waived or set back. If “all requirements” included waivers and setbacks, the language would be meaningless and superfluous. Every OSS petitioner, regardless of lot size, is required to comply with the TCSC’s provisions or else obtain waivers or set backs. Thus, the phrase is meaningful only if the application’s sole deficiency is lot size.

Thurston County v. Griffin, 137 Wn.App. 609, 618 ¶17, 154 P.3d 296 (2007).

G. Petition for Review Granted

This Court granted Mr. Griffin's petition for review. In granting the petition, this Court limited its review only to the issue of the interpretation of the Thurston County Sanitary Code.

VI. STANDARD OF REVIEW

The Court should review the Board of Health's construction of the language of § 21.4.5.3 *de novo*. *Ford Motor Co. v. City of Seattle, Executive Services Dept.*, 150 Wn.2d 32, 41 ¶ 14, 156 P.3d 185 (2007). The Court should give effect to the ordinance's plain meaning. *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004).

To the extent the Court determines the language of the ordinance to be plain, then the Court should not grant any deference to the interpretation placed upon it by the Board. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 646 ¶ 14, 151 P.3d 990 (2007). Even if the Court were to find the language of the ordinance to be ambiguous, the Court should grant the Board no deference, because the Board interpreted a model ordinance, the language of which was drafted by the Department of Health, and the Board therefore lacked expertise with respect to its intended meaning. *See Crescent Convalescent Ctr. v. Department of Social and Health Services*, 87 Wn.App. 353, 357-58, 942 P.2d 981 (1997); *Russell v. Department of Human Rights*, 70 Wn.App. 408, 412, 854 P.2d 1087 (1993), *review denied*, 123 Wn.2d 1011 (1994).

Finally, if faced with two competing constructions, the Court should construe the ordinance in a way that renders it constitutional. *In re J.M.K.*, 155 Wn.2d 374, 387 ¶ 23, 119 P.3d 840 (2005).

VII. ARGUMENT

A. A Septic Permit Applicant Who Utilizes Alternative Setback and Similar Standards as Specifically Authorized by the Code Meets “All Requirements” of the Code.

Code § 21.4.5.3 requires small lot septic permit applicants to satisfy “all requirements of the Code other than minimum lot size.” The sole issue presented to this Court is how to construe the phrase “all requirements” as it is used in § 21.4.5.3. The Court should give the phrase “all requirements” its plain meaning. *See, e.g., Sleasman v. City of Lacey*, 159 Wn.2d 639, 641 ¶ 7, 151 P.3d 990 (2007). Cases to this effect are legion.

The plain meaning of the word “all” is “the entire or total number” or “any, whatsoever.” *Parkridge Associates, Ltd. v. Ledcor Industries, Inc.*, 113 Wn.App. 592, 602, 54 P.3d 225 (2002). Where the Sanitary Code on its face provides for alternative standards, a septic permit applicant meets “all requirements” of the Code by meeting “any” of the alternative standards provided for on the face of the Code. Such an applicant fully complies with the rules. He does not, as the two members of the Board of Health suggested, seek to “modify the rules,” or ask for a “waiver” of the rules’ application to him.

Here, Mr. Griffin submitted a septic permit application that fully complied with every specific requirement of the Code. AR 3 (Conclusion of Law No. 4). Mr. Griffin’s septic permit application utilized alternative setbacks and other criteria in exactly the manner contemplated and authorized by the Code. Mr. Griffin’s septic application

therefore met “all requirements” of the Code, under the plain meaning of that phrase. Mr. Griffin’s application satisfied § 21.4.5.3, and he was entitled to the issuance of his permit.

The two members of the Board of Health who voted to deny Mr. Griffin his permit claimed Mr. Griffin was attempting to “modif[y] the rules set forth in the Code.” AR 3 (Conclusion of Law No. 7). This was error. Mr. Griffin did not seek to modify the rules set forth in the Code. He met the criteria for and utilized alternative standards in exactly the manner which the Code, on its face, contemplated.

It was not Mr. Griffin, but the two members of the Board who voted to deny his permit, who modified the rules. Instead of permitting Mr. Griffin to utilize “all requirements” of the Code, including alternative standards whose use is expressly authorized on the face of the Code, the two members who voted to deny Mr. Griffin’s permit permitted him to utilize only “some”—i.e., the most restrictive—of the Code’s alternative standards.

Moreover, the Board of Health, in this administrative proceeding, was not entitled to determine, as a matter of policy, that a small lot owner should be required to use the more restrictive of any alternative standard whose utilization is explicitly authorized on the face of the Code. The Department of Health made the legislative judgment at the time it incorporated these alternative standards into its regulations that compliance with either of any such standard adequately protects public health and the environment. The Thurston County Commissioners ratified that judgment when they incorporated the

Department of Health's regulations into its Septic Code. The County itself, prior to Mr. Griffin's application, accordingly had consistently interpreted its Code to allow small lot owners to utilize, as of right, any of the alternative standards provided for on the face of the Code. AR 341. The Board of Health, an administrative body, was not entitled to revisit or second-guess that legislative judgment. *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 495, 275 P.2d 899 (1954).

Finally, the Board's construction of this ordinance would effectively vest the County with an unfettered discretion to determine which small lot applicants may utilize all of the Code's requirements, and which small lot applicants are restricted to utilizing only "some" of them. Where an ordinance "leaves to the discretion of county officials the substance of determining what activities are prohibited," the ordinance is unconstitutionally vague. *Burien Bark Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). The two members' "construction" of § 21.4.5.3 would render it unconstitutionally vague.

In sum, Mr. Griffin's septic permit application fully complied with the specific requirements of the Code, including the criteria which the Code explicitly provided for the utilization of alternative setback and similar standards. Mr. Griffin's septic permit application satisfied "all requirements" of the Code, exactly as § 21.4.5.3, by its plain language, required. The two members of the Board who voted to deny Mr. Griffin's septic permit application, and thus to deny him the ability to make any use of the property

which he had invested his retirement savings, erred. The Board's 2-1 decision was wrong, and should be reversed.

B. The Phrase "All Requirements" Has Independent Meaning.

The Court of appeals similarly erred. Articulating a rationale that no one had ever advanced to it, the Court of Appeals suggested any construction of the phrase "all requirements" other than that adopted by the two members of the Board would render the phrase "meaningless and superfluous":

If "all requirements" included waivers and setbacks, the language would be meaningless and superfluous. Every OSS petitioner, regardless of lot size, is required to comply with the TSCSC's provisions *or else* obtain waivers or setbacks. Thus, the phrase is meaningful only if the application's sole *deficiency* is lot size.

Thurston County v. Griffin, 137 Wn.App. at 618 ¶ 17 (emphasis added).

The Court of Appeals' reasoning is grounded on a false dichotomy. The Code does not give permit applicants a choice between "complying with the Code's provisions" or else "obtaining waivers or setbacks." The Code, on its face, authorizes permit applicants who meet specified criteria to utilize alternative setbacks and similar standards. The Court of Appeals erred in holding that the utilization of alternative standards somehow gave rise to a "deficiency."

Moreover, the Court of Appeals plainly erred in suggesting that the phrase "all requirements" would be meaningful only if a small lot permit applicant's sole "deficiency" were lot size. Article 1, § 14 of the Code specifically authorizes septic permit applicants who cannot meet the Code's requirements, including any of the

alternative setbacks and similar standards, to ask the County, in its discretion, to waive those requirements. See also WAC 246-272-25001. Therefore, Article 3, § 21.4.5.3's requirement that a small lot applicant must meet "all requirements" of the Code other than minimum lot size has the clear purpose and effect of precluding a small lot applicant who cannot meet the Code's requirements, including those small lot applicants who cannot meet *any* of the Code's alternative setback or similar standards, from invoking Article 1, § 14 to ask the County to excuse him or her from meeting them.

Here, Mr. Griffin's septic permit application met all of the Code's specific requirements. AR 3 (Conclusion of Law No. 4). Mr. Griffin did NOT invoke Article 1, § 14 to ask the County to excuse him from meeting any of the requirements set forth on the face of the Code.

The Court of Appeals therefore erred in construing the language of § 21.4.5.3. Mr. Griffin was entitled to have the Code applied to him according to its plain meaning in the same way the County has applied it to every other small lot septic permit applicant. He is entitled to his permit, and to thereby make some use of his property.

VIII. CONCLUSION

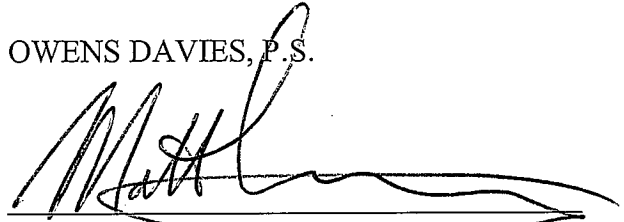
Because the Code expressly authorizes permit applicants who meet specified criteria to utilize alternative setbacks and similar standards, an applicant who meets the criteria for utilizing those alternative standards meets "all requirements" of the Code. Therefore, this Court should interpret § 21.4.5.3 to mean exactly what it says: that a

small lot septic permit applicant whose application meets “all requirements of the Code other than minimum lot size” is entitled to the issuance of a permit.

Here, Mr. Griffin’s septic permit application properly utilized and met “all requirements” of the Code. Therefore, the Court of Appeals decision should be reversed. Mr. Griffin should be issued his permit.

DATED this 1st day of May, 2008.

OWENS DAVIES, P.S.

A handwritten signature in black ink, appearing to read 'Matt Edwards', written over a horizontal line.

Matthew B. Edwards, WSBA #18332
Attorney for Jeff Griffin

IX. APPENDICES

- A** GRIFFIN SEPTIC PERMIT APPLICATION, AS APPROVED. AR 16.
- B** THURSTON COUNTY SANITARY CODE (select provisions)
 - Article I, Section 13
 - Article II, Section 9.3
 - Article II, Section 10 (excerpts);
 - Article II, Section 21.4.5
- C** CHAPTER 246-272 WAC, ON-SITE SEWAGE SYSTEMS (select provisions)
 - WAC 246-272-09001(3)(a)
 - WAC 246-272-09501(1), Table 1, (3)
 - WAC 246-272-11501(2)(c)(i)
 - WAC 246-272-20501(4)(e)
 - WAC 246-272-25001(1)
- D** TESTIMONY OF THURSTON COUNTY ENVIRONMENTAL HEALTH OFFICER STEVE PETERSON (AR 339-341)
- E** BOARD OF HEALTH DECISION (AR 1-4)
- F** TRIAL COURT DECISION
- G** COURT OF APPEALS' PUBLISHED DECISION

DESIGNED BY L. SATER		DATE 11/17/2	REVISIONS		CONTRACT NO. 
ENTERED BY L. SATER		NO. 1	DATE 12/23/2	REVISION PER COUNTY COMMENTS	
CHECKED BY		2	5/10/5	REVISION PER COUNTY COMMENTS	
PROJECT ENGINEER B. MATTHEWS		3	5/21/5	REVISION PER COUNTY COMMENTS	
DESIGNED BY L. SATER ENTERED BY L. SATER CHECKED BY PROJECT ENGINEER B. MATTHEWS		DATE 11/17/2 NO. 1 DATE 12/23/2 NO. 2 DATE 5/10/5 NO. 3 DATE 5/21/5		REVISIONS REVISION PER COUNTY COMMENTS REVISION PER COUNTY COMMENTS REVISION PER COUNTY COMMENTS	


**SKILLINGS
& CONNOLLY**

6018 Lucy Boulevard SE, Lucy, Washington 98503
 (360) 491-5349 (360) 454-7454 Fax: (360) 491-5067

DEVELOPMENT SERVICES

GRIFFIN

RESIDENCE

THURSTON COUNTY WASHINGTON
 ON-SITE SEWAGE
 DISPOSAL PLAN
 000011

APPENDIX A

6018 Lucy Boulevard SE, Lucy, Washington 98503
 (360) 491-5349 (360) 454-7454 Fax: (360) 491-5067

DEVELOPMENT SERVICES

GRIFFIN

RESIDENCE

THURSTON COUNTY WASHINGTON
 ON-SITE SEWAGE
 DISPOSAL PLAN
 000011

APPENDIX A

SYSTEM CALCULATIONS

RATE FOR TYPE 2B= 1.0 GAL/DAY/S.F.
 D FOR 1 BEDROOM RESIDENCE WITH USE OF 120 GALLONS PER DAY
 REA= 120 GPD/1.0 GPD PER S.F.= 120 S.F.
 NO RESERVE AREAS TO BE INSTALLED DURING CONSTRUCTION

IS C 140

LATERAL DATA

15.0 feet	*6. LATERAL DIAMETER	1.5 inch
2.7 feet	*7. ORIFICE SPACING	2 feet
200	*8. ORIFICE DIAMETER	3/16" inch
3	9. ORIFICES PER LATERAL	8

MANIFOLD DATA

5.3 feet	*12. MANIFOLD DIAMETER	1.5 inch
200	13. MANIFOLD TYPE	END

FORCE MAIN DATA

10.0 feet	*18. SWING CHECK VALVES	1
200	*19. GATE VALVES	3
1.5 inch	*20. OTHER VEL. HEADS LOST	3
4		

STEM HEAD - FLOW DATA

VALUES OF PRESSURE AND FLOW AT THE PUMP USING
 PRESSURE ON THE LAST ORIFICE AND INCREMENTING
 PRESSURE ON THE LAST ORIFICE BY 1 FEET.
 ELEVATION ABOVE PUMP = 5 FEET

OF HEAD - DISCHARGE DATA

DELTA FLOW IN LATERAL	HEAD AT DISTAL LATERAL (feet)	HEAD AT FORCE MAIN (feet)	DELTA HEAD IN MANIFOLD <10% ok	TOTAL SYSTEM FLOW (gal/min)	TOTAL SYSTEM HEAD (feet)
0.2	2.01	1.97	-1.7	14.1	7.6
0.2	3.01	2.96	-1.8	17.2	8.9
0.2	4.02	3.95	-1.8	19.9	10.2
0.2	5.02	4.93	-1.8	22.3	11.5
0.1	6.03	5.92	-1.8	24.4	12.8
0.1	7.03	6.90	-1.8	26.3	14.1
0.1	8.03	7.89	-1.8	28.1	15.4
0.1	9.04	8.87	-1.8	29.9	16.7
0.1	10.04	9.86	-1.8	31.5	18.0
1.1	11.04	10.84	-1.8	33.0	19.3

Pipe System Volume = 7.3 gallons

PROJECT INFORMATION

PARCEL #: 76200001100

OWNER: JEFF GRIFFIN
 9612 MARINER DR NW
 OLYMPIA, WA 98502
 (360) 402-5207

DESIGNER: SKILLINGS-COONOLLY, INC.
 LANE SATER
 5016 LACEY BLVD SE
 LACEY, WA 98503
 (360) 491-3399

DESIGN INFO: DAILY FLOW: 120 GAL/DAY

LOT SIZE: 25'x114'

SOIL LOG:

0'-5"	ORGANICS
5'-16"	SILT LOAM ROOTS TO 14"
16'-5'5"	CLAY- LIGHT GRAY COLOR
5'5"-6'0"	COMPACTED GRAVELY SAND
6'0"-8'0"	CLEAN SAND (SOIL TYPE 2B)

STEAMBOAT ISLAND

SITE

PUGET SOUND

STEAMBOAT ISLAND ROAD

TO HWY 101

VICINITY MAP

NOT TO SCALE

120 S.F./24 ORIFICES
 PROVIDES 5 S.F.
 INFILTRATION AREA
 PER ORIFICE

8 ORIFICES
 PER LATERAL
 W/LAST ORIFICE
 ORIENTED UP
 & SHIELDED
 TYPICAL

1.5" PVC BALL VALVE
 (TYPICAL)

FROM TANKS

PRIMARY

LATERAL (TYP)

RESERVE

6" PVC ACCESS PORT

PLUG IN SLEEVE

PVC LINER

LATERAL

RESERVE

PRIMARY

TYP VALVE ACCESS PORT
 END VIEW (NTS)

NOTE:

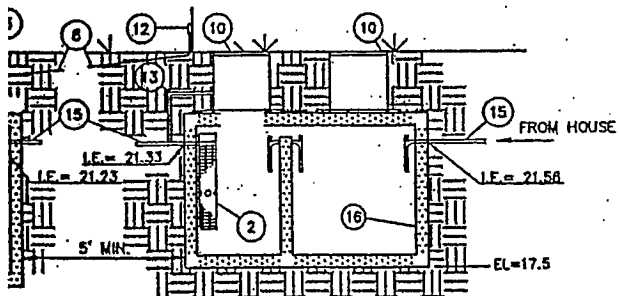
1. VALVE ACCESS PORTS TO BE PROVIDED AT ALL VALVE LOCATIONS
2. CLEANOUT PORTS TO BE PROVIDED AT THE ENDS OF ALL LATERALS AND MONITORING PORTS TO BE INSTALLED AS SHOWN IN PLAN VIEW
3. VALVES ON LATERALS TO BE ADJUSTED TO PROVIDE 2" SQUIRT ON LAST ORIFICE PERMANENT MARKS ARE TO BE PROVIDED ON VALVE BOX SHOWING CORRECT POSITION

MONITORING/CLEANOUT PORT

NOT TO SCALE

NETWORK SCHEMATIC

NOT TO SCALE



MERCURY FLOAT SWITCHES
 TO SECURED P.V.C. PIPE & SET FOR
 PUMP CYCLE

CONCRETE RISER W/ TRAFFIC RATED
 STEEL MANHOLE COVER (H-20 LOADING)

750 GAL. WATER TIGHT CONCRETE
 PUMP CHAMBER WITH H-20
 RATED LOADING, CONC. RISER
 AND TRAFFIC RATED STEEL
 MANHOLE COVER

DAILY DOSE VOLUME = 120 GAL
 @ 5 DOSES/DAY

SET TIMER AT 1.7 MIN. ON,
 54.30 MIN. OFF

DOSE INTERVAL VOLUME = 72 GAL±

(12) CONTROL PANEL "ORENCO"
 WATER PROOF

(13) 2" P.V.C. VENT PIPE TO RISER

(14) "ORENCO" TANK ADAPTER SEALED
 TO TANK.

(15) 4" SCH 40 PVC, 2% MIN. SLOPE
 TO SECURED P.V.C. PIPE (NOT SHOWN)
 USE FLEX COUPLINGS AT
 ALL TANK CONNECTIONS

(16) 1000 GAL. 2 CHAMBER SEPTIC TANK
 H-20 RATED LOADING

NK DETAIL

SCALE

THURSTON COUNTY

RECEIVED

MAR 24 2005

DEVELOPMENT SERVICES

THE CONTRACTOR SHALL BE FULLY RESPONSIBLE FOR THE LOCATION
 AND PROTECTION OF ALL EXISTING UTILITIES.
 THE CONTRACTOR SHALL VERIFY ALL UTILITY LOCATIONS PRIOR TO
 CONSTRUCTION BY CALLING THE UNDERGROUND LOCATE LINE AT
 1-800-424-5555
 A MINIMUM OF 48 HOURS PRIOR TO ANY EXCAVATION.
 THE CONTRACTOR WILL ALSO BE RESPONSIBLE FOR MAINTAINING
 ALL LOCATE MARKS ONCE THE UTILITIES HAVE BEEN LOCATED.

**KILLINGS
 CONNOLLY**

yard SE, Lacey, Washington 98503
 (800) 454-7545 Fax (360) 491-3857

**GRIFFIN
 RESIDENCE**

THURSTON COUNTY WASHINGTON

**ON-SITE S
 DISPOSAL**

00

Appendix A: Page 3
 Approved Septic Application
 AR 16
 Full Size (Right Half)

SECTION 13 WAIVER OF CODE PROVISIONS. Whenever a strict inter-pretation of this Code would result in significant hardship, a person may request a waiver of the provision causing hardship from the administrative hearing officer.

13.1 Information Required for the Submission of a Request for Waiver of Code Provisions. Any person filing a request for waiver of code provisions shall provide the following information:

- (a) requestor's name and mailing address;
- (b) permit applicant's name and mailing address;
- (c) property owner's name and mailing address;
- (d) code provision requested to be waived;
- (e) reasons that the code provision cannot be met;
- (f) permit type, permit number, parcel number or legal description if real property is involved;
- (g) a summary of the nature of the request;
- (h) a summary of the design alternatives that exist for this issue; and
- (i) a summary of how the specific proposal would mitigate health hazards or risks to the public health.

13.2 Notification.

13.2.1 Whenever a waiver of a provision of this Code involves a setback to 1) a neighbor's water source; or 2) a neighboring property, then all property owners whose property would be directly involved in such a setback requirement shall be notified of the request for waiver and be given an opportunity to comment and an opportunity to request an administrative hearing prior to a decision being made by the administrative hearing officer.

13.2.2 In cases of requests for waiver of solid waste disposal site

regulations, property owners within 1320 feet, (one quarter mile) of the subject property shall be notified.

13.2.3 Any person required to be notified by this Section may submit comments for consideration by presenting such comments in writing, to the health officer. Comments must be submitted within seven (7) calendar days of mailing the notice.

13.2.4 It shall be the responsibility of the person requesting a waiver, to provide the names and addresses of persons required to be notified in Sections 13.2.1 and 13.2.2, above.

13.2.5 Contents of Notification. The notification of waiver request shall contain the following information:

- (a) name and address of person requesting a waiver;
- (b) permit application number;
- (c) a brief description of the waiver request;
- (d) a statement that comments may be submitted;
- (e) a statement that an administrative hearing may be requested;
and
- (f) a statement of where and when comments or an administrative hearing request must be received.

13.2.6 Notification shall be deemed complete when a written notice to the person's last known address has been deposited in the U.S. Mail or has been served on the person according to Section 7.2 of this Article.

13.3 Administrative Hearings Regarding Waiver Requests. Administrative hearings shall be conducted if requested by the person desiring the waiver or by the request of any person required to be notified of such a waiver request. An administrative hearing shall be conducted in accordance with Section 8 of this Article if the applicant or a notified person requests one. The administrative hearing shall be conducted within fifteen (15) calendar days of receipt of hearing request.

13.4 Decisions Without a Hearing. The administrative hearing officer may decide the issue without an administrative hearing if there is no response from notified parties within seven (7) calendar days of mailing the notification, or if written statements from the persons who should be notified, as in Section 13.2, above, are presented stating that they do not object to the waiver.

13.5 Decisions. The administrative hearing officer shall consider all evidence and testimony pertaining to the request for waiver. He or she may approve the waiver request, or a portion of the request, upon finding that 1) compliance with the Code provision(s) would result in significant hardship; 2) the approval is consistent with the intent of this code; and 3) the approval of the waiver would not result in a hazard to the public health nor significantly increase risk to the potentially affected persons. The administrative hearing officer may set conditions, limitations, and time limits as part of any waiver decision.

13.6 Notice of Decision. A copy of the decision shall be transmitted to the requestor of the waiver and to each party who has submitted comment or has requested a copy of the decision.

13.7 Appeal. Any person 1) who requested a waiver; or 2) who is entitled to notification as set forth in Section 13.2.1 and 13.2.2 of this Article and who submitted written comment on the waiver request; or 3) any person who is entitled to notification under Sections 13.2.1 and 13.2.2 of this Article and appeared to testify at an administrative hearing regarding a waiver request and who is aggrieved by the decision regarding the waiver request may appeal to the Board of Health according to the provisions of this Article. Such appeal must be in writing, and be presented to the health officer within ten (10) calendar days and as stated in Section 8.6 of this Article.

13.8 Concurrence. In the event the regulation or code provision to be waived is also a state law or regulation, the concurrence of the Secretary of the Washington State Department of Health or other responsible official must be obtained prior to the waiver being considered complete and in effect.

13.9 Process for Solid Waste Permit Variance Request. The foregoing process shall be supplemental to the variance guidelines for solid waste permit variances contained in WAC 173-304-700.

SECTION 14 EQUIVALENCY. Alternate methods, techniques and specifications which differ from those set forth in this Code may be allowed by the health officer if it can be demonstrated to the health officer's satisfaction that the alternative

9.3 The health officer shall:

- 9.3.1 Issue an OSSP when the information submitted under subsection 9.1 meets the requirements contained in this article.

SECTION 10 LOCATION.

- 10.1 Persons shall design and install OSS to meet the minimum horizontal separations shown in Table I, Minimum Horizontal Separations:

**TABLE I
MINIMUM HORIZONTAL SEPARATIONS**

Items requiring setback	From edge of disposal component and reserve area	From septic tank, holding tank, containment vessel, pump chamber, and distribution box	From building sewer, collection, and non-perforated distribution line¹
Non-public well or suction line	100 ft.	50 ft.	50 ft.
Public drinking water well	100 ft.	100 ft.	100 ft.
Public drinking water spring ^{2, 3}	200 ft.	200 ft.	100 ft.
Spring or surface water used as drinking water source ^{2, 3}	100 ft.	50 ft.	50 ft.
Pressurized water supply line ⁴	10 ft.	10 ft.	10 ft.
Properly decommissioned well ⁵	10 ft.	N/A	N/A
Surface water ³ Marine water Fresh water	100 ft. 100 ft.	50 ft. 50 ft.	10 ft. 10 ft.
Building foundation	10 ft. ⁶	5 ft. ⁶	2 ft.

Thurston County Board of Health
Rules and Regulations Governing Disposal of Sewage
Article IV

Items requiring setback	From edge of disposal component and reserve area	From septic tank, holding tank, containment vessel, pump chamber, and distribution box	From building sewer, collection, and non-perforated distribution line ¹
Property or easement line ⁶	5 ft.	5 ft.	N/A
Interceptor / curtain drains/ drainage ditches, stormwater drywells Down-gradient ⁷ Up-gradient ⁷	30 ft. 10 ft.	5 ft. N/A	N/A N/A
Down-gradient cut or bank with at least 5 ft. of original, undisturbed soil showing above a restrictive layer due to a structural or textural change ^{7, 8}	25 ft.	N/A	N/A
Down-gradient cut or bank with less than 5 ft. of original, undisturbed, soil showing above a restrictive layer due to a structural or textural change ^{7, 8}	50 ft.	N/A	N/A
Downgradient cut or bank that extends vertically less than 5 feet from the toe of the slope to the top of the slope that doesn't have a restrictive layer showing ^{7, 8}	10 ft.		

¹ "Building sewer" as defined by the most current edition of the Uniform Plumbing Code. "Non-perforated distribution" includes pressure sewer transport lines.

² If surface water is used as a public drinking water supply, the designer shall locate the OSS outside of the required sanitary control area.

- 3 Measured from the ordinary high-water mark.
- 4 The health officer may approve a sewer transport line within 10 feet of a water supply line if the sewer line is constructed in accordance with section 2.4 of the Washington state department of ecology's "Criteria For Sewage Works Design," revised October 1985, as thereafter updated, or equivalent.
- 5 Before any component can be placed within 100 feet of a well, the designer shall submit a "decommissioned water well report" provided by a licensed well driller, which verifies that appropriate decommissioning procedures noted in chapter 173-160 WAC were followed. Once the well is properly decommissioned, it no longer provides a potential conduit to groundwater, but septic tanks, pump chambers; containment vessels or distribution boxes should not be placed directly over the site.
- 6 The health officer may allow a reduced horizontal separation to not less than two feet where the property line, easement line, or building foundation is up-gradient.
- 7 The item is down-gradient when liquid will flow toward it upon encountering a water table or a restrictive layer. The item is up-gradient when liquid will flow away from it upon encountering a water table or restrictive layer.
- 8 This setback is unrelated to setbacks that are necessary for slope stability or other purposes.
- 10.2 Where any condition indicates a greater potential for contamination or pollution, the health officer may increase the minimum horizontal separations. Examples of such conditions include excessively permeable soils, unconfined aquifers, shallow or saturated soils, dug wells, and improperly abandoned wells.
- 10.3 The horizontal separation between an OSS disposal component and an individual water well, spring, or surface water can be reduced to a minimum of 75 feet, upon signed approval by the health officer if the applicant demonstrates:
 - 10.3.1 Adequate protective site specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration. Examples of such conditions include evidence of confining layers and or aquatards separating any potable water from the OSS treatment zone or there is an excessive depth to groundwater; or
 - 10.3.2 Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in Table IV in subsection 12.2.6 of this article; or

10.3.3 Evidence of protective conditions involving both subsections
10.3.1 and 10.3.2.

21.4 The health officer may:

- 21.4.5 Permit the installation of an OSS, where the minimum land area requirements or lot sizes cannot be met, only when all of the following criteria are met:
- 21.4.5.1 The lot is registered as a legal lot of record created prior to January 1, 1995; and
 - 21.4.5.2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection; and
 - 21.4.5.3 The proposed system meets all requirements of these regulations other than minimum land area.

**Chapter 246-272 WAC
ON-SITE SEWAGE SYSTEMS**

WAC 246-272-09001 Permits for OSS under three thousand five hundred gallons per day.

...

(3) The local health officer shall:

(a) Issue a permit when the information submitted under subsection (1) of this section meets the requirements contained in this chapter and in local regulations;

...

WAC 246-272-09501 Location. (1) Persons shall design and install OSS to meet the minimum horizontal separations shown in Table I, Minimum Horizontal Separations:

**TABLE I
MINIMUM HORIZONTAL SEPARATIONS**

Items requiring setback	From edge of disposal component and reserve area	From septic tank, holding tank, containment vessel, pump chamber, and distribution box	From building sewer, collection, and non-perforated distribution line ¹
Non-public well or suction line	100 ft.	50 ft.	50 ft.
Public drinking water well	100 ft.	100 ft.	100 ft.
Public drinking water spring ³	200 ft.	200 ft.	100 ft.
Spring or surface water used as drinking water source ^{2,3}	100 ft.	50 ft.	50 ft.
Pressurized water supply line ⁴	10 ft.	10 ft.	10 ft.
Properly decommissioned well ⁵	10 ft.	N/A	N/A
Surface water ³			
Marine water	100 ft.	50 ft.	10 ft.
Fresh water	100 ft.	50 ft.	10 ft.
Building foundation	10 ft. ⁶	5 ft. ⁶	2 ft.
Property or easement line ⁶	5 ft.	5 ft.	N/A
Interceptor/curtain drains/drainage ditches			
Down-gradient ⁷	30 ft.	5 ft.	N/A
Up-gradient ⁷	10 ft.	N/A	N/A

...
⁴The local health officer may approve a sewer transport line within ten feet of a water supply line if the sewer line is constructed in accordance with section 2.4 of the department of ecology's "Criteria for Sewage Works Design," revised October 1985, or equivalent.

...
⁶The local health officer may allow a reduced horizontal separation to not less than two feet where the property line, easement line, or building foundation is up-gradient.

⁷The item is down-gradient when liquid will flow toward it upon encountering a water table or restrictive layer. The item is up-gradient when liquid will flow away from it upon encountering a water table or restrictive layer.

Items requiring setback	From edge of disposal component and reserve area	From septic tank, holding tank, containment vessel, pump chamber, and distribution box	From building sewer, collection, and non-perforated distribution line ¹
Down-gradient cuts or banks with at least 5 ft. of original, undisturbed soil above a restrictive layer due to a structural or textural change	25 ft.	N/A	N/A
Down-gradient cuts or banks with at least 5 ft. of original, undisturbed soil above a restrictive layer due to a structural or textural change	50 ft.	N/A	N/A

(3) The horizontal separation between an OSS disposal component and an individual water well, spring, or surface water can be reduced to a minimum of seventy-five feet, by the local health officer, and be described as a “conforming” system upon signed approval by the health officer if the applicant demonstrates:

(a) Adequate protective site specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration. Examples of such conditions include evidence of confining layers and or aquatards separating potable water from the OSS treatment zone, excessive depth to groundwater, down-gradient contaminant source, or outside the zone of influence; or

(b) Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in WAC 246-272-11501(2)(f) Table IV; or

(c) Evidence of protective conditions involving both (a) and (b) of this subsection.

WAC 246-272-11501 Design.

...

(2) The local health officer and the department shall require the following design criteria:

...

(c) The OSS is designed to treat and dispose of the following flows:

(i) For single family residences, one hundred twenty gallons per bedroom per day, with a minimum of two hundred forty gallons per day, unless technical justification is provided to support calculations using a lower design flow;

...

WAC 246-272-20501 Developments, subdivisions, and minimum land area requirements.

...

(4) The local health officer may:

...

(e) Permit the installation of an OSS, where the minimum land area requirements or lot sizes cannot be met, only when all of the following criteria are met:

(i) The lot is registered as a legal lot of record created prior to the effective date of this chapter;

(ii) The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection; and

(iii) The proposed system meets all requirements of these regulations other than minimum land area.

...

WAC 246-272-25001 Waiver of state regulations. (1) For individual, site-by-site waiver requests, if concurrence is granted by the department, the local health officer may grant a waiver from specific requirements in this chapter for OSS under three thousand five hundred gallons per day only after the following procedure has been completed:

(a) The applicant submits a waiver application to the local health officer, including justification describing how the requested waiver is consistent with purpose and objectives to meet the public health intent of this chapter;

(b) If the local health officer determines that the waiver is consistent with the standards in and the intent of this chapter;

(c) On a quarterly basis, the local health officer will forward to the department any approved or denied waivers for their records.

FUTTERMAN: Okay. With that, I'll turn it over to Steve Peterson.

PETERSON: Good morning, my name's Steve Peterson. I'm with the Environmental Health Division and to the right is Mr. Randy Frebie, our technical lead in onsite program. We'll be reviewing the staff process and doing a quick summary for you based on the staff report that you have received with the associated exhibits.

OBERQUELL: Did- has everybody-did you receive a copy of the staff report? Okay, thank you. Heads are nodding at both ends of tables. Thank you.

(Mumbling)

PETERSON: A project was submitted by Mr. Jeff Griffin in November 2004. It was for an onsite sewage system proposal for the referenced property on Steamboat Island. In the exhibits, the application is listed as Exhibit A with the specific design the staff reviewed and approved listed as Exhibit B.

The property is located on the shore of Steamboat Island, the Thurston County Assessor's office has it listed as .07 acres, the design proposal lists it as 2,825 square feet approximately. As Jane had indicated, the minimum lot size for newly

Appendix D: Page 1

AR 339

Testimony of Thurston County

Environmental Health

Officer Steve Peterson

this soil type are 2,000-exuse me-12,500 square feet. So staff considered it an existing lot of record as it was platted in approximately 1927.

The engineered sewage system proposal was for a 120 gallon per day flow, single bedroom, single family residence, consisting of two drainfields, installed at the same time, both the primary drainfield and the reserve drainfield. Staff reviewed this proposal as it historically is done with all existing lots of record. It's not unusual to go through some types of setback reductions on existing lots. In this particular case several setback reductions were granted under the Code, specifically the setback from the drainfield to the property line was reduced from five feet to two and a half feet. And again, that is specifically allowed under Thurston County Sanitary Code Article 4 Section 10. It specifies that if there's certain conditions met, the setback reductions can be reduced.

The same scenario for a reduction from the drainfield to the building foundation that was reduced from ten feet down to two feet. Setback to the surface water, Puget Sound, was reduced from 100 feet to 75 feet. Article 4, Section 10.3 indicates special criteria that need to be met to allow that reduction from 100 feet down to 75 feet. The conditions were met and staff allowed the reduction to 75 feet.

Two waivers were actually granted in the review of this project. The first waiver revolves around a winter water evaluation. What a winter water evaluation is, it's an evaluation of deep soils on the Island to determine if there is any restrictive layer or ground water in that sand. And basically what staff are looking for is, is it an appropriate material to go into with a drainfield. The applicant applied for a waiver against the Department's policy to hold it for a winter water evaluation, the documentation that was submitted included a soil scientist's report, and I believe the soil scientist just came in and is available for testimony. But basically it was determined staff observations during the winter and the soil scientist's report that the waiver was grantable.

For the record, the Department considered the winter water evaluation invalid because we didn't get enough rainfall or rainfall spread out over a long enough period to actually come to a determination on our own. That's when Mr. Griffin obtained a soil scientist, they submitted additional information, we concurred, granted the waiver.

The second waiver was granted on the property. It's referred to as a Class A Waiver, that's a designation that Washington State Department of Health gives that type of waiver, and basically what it is, it's if certain mitigating circumstances can be met on the site or via the design proposal, the waivers granted. Basically, the State has already set forth what the mitigation measures need to be to grant the waiver. The design incorporated those mitigation factors, and staff granted the waiver from that water supply line to the tanks from ten feet to five feet, and it's not the water supply line for the public water system. It's the water supply line that serves the proposed residence only.

A design flow reductions were also proposed in the design proposal. Article 4 states that the minimum design flow for a single family residence should be 240 gallons a day, unless other technical justification is provided for allowing smaller flows. The engineer

design basically provided technical justification that staff reviewed and concurred with. The justification was low flow fixtures in the residence. The drainfield flow is controlled by a timer device on the pump chamber. And what that is, its-its kind of like a light timer. It controls when that pump comes on and off so it can be set in such a manner that a limited number of gallons are pumped out to the drainfield on a daily basis. If I understand the design correctly, the proposal is to limit the flow to the drainfield at 120 gallons per day. The design was not required to, but for various reasons the engineer proposed, alternating drainfields. That's the installation of both the primary drainfield with an in-use system and the reserve area. The proposal I believe was to alternate the drainfields at six months intervals, I believe.

All the setback reductions and the waivers are allowable under the Code, historically the Department has allowed those on existing lots of record. Staff then made the determination that it did meet the minimum requirements set forth in the regulations and made the determination to approve the design.

BEFORE THE BOARD OF HEALTH
THURSTON COUNTY, WASHINGTON

AUG 23 2005

In Re the Matter of,

Jeff Griffin

DECISION

OWENS DAVIES, P.S.

THIS MATTER came before the Board of Health (Board) on or about June 21, 2005, as a result of an appeal by Jeff Griffin of the Hearing Officer's decision, dated May 16, 2005, which granted the appeal of Bruce Carter, denying the application for an on-site sewage system permit [OSS] by the Griffin's for an undersized lot on Tax Parcel #76200001100.

The Board has reviewed the decision of the hearing officer; all evidence presented to the Board, [Listed in Attachment A to this Decision] and heard the testimony and argument of Appellant Jeff Griffin and his witnesses, as well as the testimony and argument of Thurston County and its witnesses.

Based on the above record, a majority of the Board adopts the findings, facts, conclusions and decision of the Hearings Officer denying the issuance of an OSS to the Griffins'. [Cathy Wolfe of the Board of Health dissents, and her dissent follows herein.] This denial is based upon the following findings and conclusions:

a) Findings

A majority of the Board of Health finds as follows:

- 1) The Appellant Jeff Griffin applied for a permit to install an OSS to serve a home on Lot 11 of Steamboat Island.
- 2) Lot 11 is currently vacant, is approximately 2,850 square feet in size, and has dimensions of 114 feet by 25 feet.
- 3) There are approximately 42 existing homes on Steamboat Island, which is approximately 8 acres in size. Steamboat Island was platted in 1927, and 126 lots are shown on the recorded plat map.
- 4) The design proposal is for a sewage system that utilizes pressure distribution and a sand lined bed to treat the septic tank effluent before it flows into native sands found approximately five (5) feet below the ground surface.
- 5) Griffin requested and received approval for two waivers associated with the application:
 - a) Waiver of a winter water table evaluation, and
 - b) Waiver reducing the separation between the septic tank and pump chamber from ten (10) to five (5) feet.
- 6) The winter water table requirement was waived due to the conclusions of a soils report prepared by Pacific Rim Soil and Water, and the results of on-site evaluation performed by Griffin and an agent of the Health Officer. The tank and pump separation waiver was granted as the application complied with "mitigating measures" established by the Washington State Department of Health for this type of application.
- 7) Griffin requested and received approval for three setback reductions associated with the application:

- a) Horizontal setback between disposal component and building foundation from ten (10) feet to two (2) feet,
 - b) Horizontal setback between disposal component and adjacent property line from five (5) feet, and
 - c) Horizontal setback between disposal component and surface water from one hundred (100) feet to seventy-five feet (75).
- 8) The rationale for granting the building foundation setback used by the Department was that the foundation would be slightly uphill of the disposal component and that the drain field bed would be lined with plastic to prevent lateral movement of the effluent from the drain field to the foundation. The rationale for granting the building foundation setback used by the Department was that the adjacent property line was "up gradient", the plastic liner for the drain field, and that "no impervious layer was located below the disposal component." The rationale for granting the building foundation setback used by the Department was that "the enhanced effluent treatment would be provided by the sand lined bed system that utilizes pressure distribution."
- 9) Griffin requested and received from the Department a reduction in the minimum design flow from 240 to 120 gallons per day for a single-family residence. The reduction was granted as the application shows a one-bedroom floor plan, pump timers that will limit discharge from the system to 120 gallons per day, the plan has a primary and reserve system to handle "overflow" capacity, and the installation of low flow fixtures to reduce wastewater production.
- 10) Griffin requested and received from the department to install an OSS on a lot that did not meet the minimum land area requirements stated in Article IV of the Sanitary Code. Article IV, Section 21.4.5.3 allows for construction of an OSS on a too-small lot if "all (other) requirements" are met. The Department determined that with the waivers and setbacks that were allowed based upon Griffin's actions, the "all (other) requirements" provision had been met, and the application was granted.
- 11) Bruce Carter, who with his sister owns an adjacent parcel and appealed the issuance of the permit claiming that they would be adversely affected if the approved system failed.
- 12) The appeal went to the Hearing Officer. The Hearing Officer granted the appeal and denied the issuance of the permit to the Griffins.
- 13) The Hearing Officer cited the following relevant criteria that were considered in denying the permit [other criteria cited by the Hearing Officer in his decision were shown to be corrected at the time of the Board of Health hearing]:
- a) The Hearing Officer first determined that the minimum land area requirements and density are significant public health issues when considering the permitting of OSS on undersized lots, and that the Health Officer or their designee should "take a conservative position when considering how to apply Section 21.4.5.3".
 - b) That the only way for the lot to be developed was to allow a "substantial number" of waivers and horizontal setback reductions.
 - c) The greatest concern of the setback reductions was the shortened distance between the system and surface waters. The current requirement is 100 feet.

- 14) At the public hearing, Thurston County presented the facts and evidence underlying the Health Officers position, testimony provided by Art Starry, as well as why the County originally approved the application, testimony provided by Steve Peterson. The County did not make a recommendation to the Board; instead, it asked the Board to focus on the term "all (other) requirements" found in Article IV, Section 21.4.5.3 and asked the Board to interpret the meaning of this language in relation to small-lot OSS applications.
- 15) Griffin presented wastewater flow report evidence and testimony from Robert G. Connolly, P.E. of Skillings-Connolly, a local and reputable soils engineering firm, as well as testimony from Lisa Palazzi, CPSS and the previous report submitted by Pacific Rim Soil and Water. These reports supported Griffin's contention that the waivers and setbacks were plausible considering the makeup of the soils underlying the subject parcel. Griffin also solicited testimony from Doug DeForrest and Bruce Carter.
- 16) The BOH considered evidence submitted by Griffin, Carter, and the County.

b) Conclusions

Based upon the above findings, a majority of the Board of Health Concludes as follows:

- 1) That Article IV, Section 21 of the Thurston County Sanitary Code covers OSS permits for too-small lots.
- 2) That Article IV, section 21.4.5 states that the Health Officer may (emphasis added) permit the installation of an OSS where minimum land area requirements or lot sizes only when...
 - 21.4.5.1 The lot is registered as a legal lot of record created prior to Jan 1, 1995; and
 - 21.4.5.2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection; and
 - 21.4.5.3 The proposed system meets all requirements of these regulations other than minimum land area. (Emphasis added)
- 3) That there is no issue in front of the Board concerning 21.4.5.1 or 21.4.5.2.
- 4) That the Griffins did what the Department required of them to obtain the waivers and modified setback required.
- 5) That no scientific evidence has been submitted to refute the findings of the soils or wastewater flow reports submitted by Griffin.
- 6) That the issue for the Board is to determine if the application has met all other requirements other than minimum land area as required by 21.4.5.3.
- 7) That a majority of the Board agrees with the Hearings Officer in that the language in 21.4.5.3 should be construed conservatively. "All (other) requirements" means that an application for an OSS on a too-small lot should satisfy all requirements related to permitting at the time of application without having to result to waivers, setback adjustments or other modification of the rules found within the Code

Based upon the above findings and conclusions, IT IS HEREBY ORDERED AS FOLLOWS:

(1) The Griffin's appeal is denied. The hearing officer's decision is affirmed.

DATED this 15th day of August, 2005.

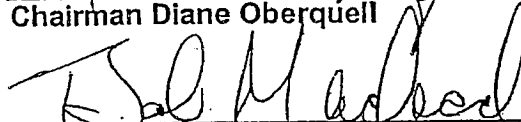
ATTEST:

Clerk of the Board

BOARD OF HEALTH

Thurston County, Washington


Chairman Diane Oberquell

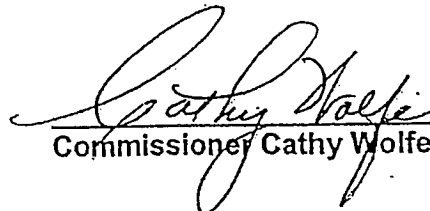

Commissioner Robert N. Macleod

Dissent

I respectfully dissent.

I agree with the findings of the Board and the Conclusions except for Conclusion No. 7. To me, the meaning of the term "all (other) requirements" is ambiguous and unclear. Therefore, I chose to err on the side of the applicant who has completed all of the requirements placed upon him by county staff.

The findings of the soils report and the wastewater flow report is undisputed. While I appreciate the concerns of the Hearings Officer, the evidence before the Board would indicate that permitting this OSS would not present a health problem to the neighbors or citizens of Thurston County. Therefore, I would vote to overturn the decision of the Hearing Officer and issue the permit to the Griffins.¹


Commissioner Cathy Wolfe

¹ It is not my preference to allow septic systems on undersized lots, and I agree that close scrutiny should be given to this type of application. However, due to the ambiguity I see, I feel that I have no choice in this situation. I would like to see the Department act quickly to amend the language of 21.4.5.3 so that this type of problem does not occur in the future.

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2 ☐ EXPEDITE
3 ☒ Hearing is set
4 Date February 3, 2006
5 Time 9 00 a m
6 Judge/Calendar Gary Tabor

FILED
SUPERIOR COURT
THURSTON WASH

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SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

JEFF GRIFFIN,

Plaintiff, NO 05-2-01587-7

VS

ORDER GRANTING JEFF GRIFFIN'S
LUPA PETITION

THURSTON COUNTY, AND ITS BOARD OF
HEALTH,

Defendant

This matter came on regularly for hearing on Friday, February 3, 2006 Plaintiff Jeff Griffin appeared by and through his counsel Matthew B Edwards of Owens Davies, P S Defendants Thurston County appeared by and through its counsel Allen Miller of the Thurston County Prosecuting Attorneys Office Bruce Carter appeared pro se

The Court considered the following pleadings

- 1 Opening Brief in Support of Jeff Griffin's Land Use Petition,
- 2 Thurston County's Brief in Opposition to Jeff Griffin's Land Use Petition, and
- 3 Additional Respondents' Brief in Opposition to Griffin Land Use Petition,
- 4 Reply Brief in Support of Jeff Griffin's LUPA Petition

In addition, the Court considered the 389 page Administrative Record, and the oral argument of counsel

ORDER GRANTING JEFF GRIFFIN S LUPA PETITION - 1
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926 24th W SW P O Box 100
Olympia
Phone
Facsimile

Appendix F: Page 1

CP 198

Order Granting Jeff Griffin's
LUPA Petition

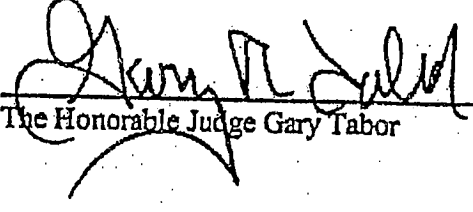
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1 Based on the foregoing, the Court finds as follows

2 1 Jeff Griffin's LUPA petition is hereby GRANTED,

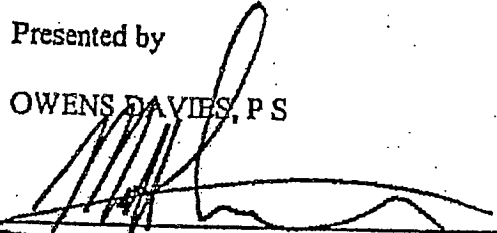
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4 2 The Thurston County Board of Health's August 1, 2005 decision to deny Mr
5 Griffin a septic permit with respect to project No 2004105629 is REVERSED and Thurston
6 County is ORDERED to issue Jeff Griffin said permit forthwith

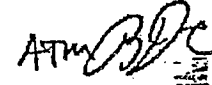
7 DATED this 3 day of February, 2006

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10 
The Honorable Judge Gary Tabor

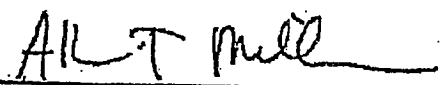
11 Presented by

12 OWENS DAVIES, P S

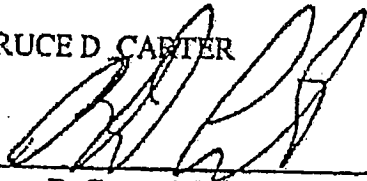
13 
14 Matthew B. Edwards, WSBA No 18332
15 Attorneys for Plaintiff

16 Approved by, *As to form only* 
17 Notice of Presentation Waived

18 THURSTON COUNTY PROSECUTING
19 ATTORNEYS OFFICE

20 
21 Allen T. Miller, Jr
22 Attorneys for Defendant

23 BRUCE D. CARTER

24 
25 Bruce D. Carter, WSBA No 2588
26 Attorneys for Bruce Carter, et al

27
28 ORDER GRANTING JEFF GRIFFIN S LUPA PETITION - 2
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Appendix F: Page 2

CP 199

Order Granting Jeff Griffin's
LUPA Petition

SCANNED

opportunity to litigate the citation fully. Thus, even under the reasoning in *Buckley*, Washington Cedar was not prejudiced and would not be entitled to relief.

¶38 But we decline to follow the *Buckley* court's interpretation in this case. The *Buckley* court was concerned that an employee might deceive a corporation by covering up a citation. *Buckley*, 507 F.2d at 80-81. Here, there was no reasonable possibility that the yard manager was going to cover up the citation. The Department was not going to forget about a penalty, and such a cover up would have inevitably failed. Eventually, the Department would have contacted someone about the citation. So long as Washington Cedar was allowed to contest the citation, as it was here, the service on the yard manager was sufficient.

¶39 The *Buckley* court also wished to promote abatement of dangerous conditions. *Buckley*, 507 F.2d at 80. This goal is adequately served by giving the citation to the person in charge of safety at the specific work site or, in this case, the regional distribution center. Service on a corporate officer, if anything, adds another layer for people to contact before the unsafe condition might be redressed.

¶40 We also expressly reject Washington Cedar's proposed interpretation applying CR 4's rules. Washington Cedar relies on WAC 263-12-125, which provides that proceedings before the Board of Industrial Insurance Appeals are governed by the statutes and rules governing civil cases in superior courts. WAC 263-12-125. A citation issued by the Department is not a proceeding before the board. If it is not appealed to the board, it becomes a final action not subject to review by any court or agency. 9.17.140(1). Moreover, as discussed above, the statutes contain their own notice provisions for appeals. And specific provisions control over general regulations. *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 102, 758 P.2d 480 (1988). Therefore, the notice in this case was notice via certified mail to the court. There was no error.

Affirmed in part, reversed in part.

Appendix G:
Griffin v. Thurston County,
137 Wn.App. 609,
154 P.3d 1296 (2007)

¶42 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ARMSTRONG and QUINN-BRINTNALL, JJ., concur.

[No. 34418-1-II. Division Two. March 20, 2007.]

JEFF GRIFFIN, *Appellant*, v. THE THURSTON COUNTY BOARD OF HEALTH, *Respondent*.

[1] Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Applicability — In General. The Land Use Petition Act (chapter 36.70C RCW) governs judicial review of local land use decisions.

[2] Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Appellate Review — Role of Appellate Court. An appellate court reviewing a local land use decision that a superior court has reviewed under the Land Use Petition Act (chapter 36.70C RCW) sits in the same position as the superior court and applies the review standards of RCW 36.70C.130 directly to the administrative record.

[3] Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Appellate Review — Error of Law — Standard of Review. Whether a local land use decision involves an erroneous interpretation of the law, warranting relief under RCW 36.70C.130(1)(b), is a question of law that an appellate court reviews de novo.

[4] Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Appellate Review — Constitutional Rights — Standard of Review. Whether a local land use decision violates a constitutional right, warranting relief under RCW 36.70C.130(1)(f), is a question of law that an appellate court reviews de novo.

[5] Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Appellate Review — Findings of Fact — Standard of Review. Under RCW 36.70C.130(1)(c) of the Land Use Petition Act, findings of fact

entered by a local adjudicator in a land use proceeding are reviewed by an appellate court under the substantial evidence standard. Substantial evidence is evidence sufficient to convince an unprejudiced, rational person that the finding is true.

[6] **Building Regulations — Land Use Regulations — Judicial Review — Land Use Petition Act — Findings of Fact — Scope of Review — In General.** Under the substantial evidence standard of RCW 36.70C.130(1)(c) of the Land Use Petition Act for reviewing findings of fact entered by a local decision maker in a land use case, the reviewing court views the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.

[7] **Municipal Corporations — Ordinances — Construction — Legislative Intent — Plain Meaning.** When construing a municipal ordinance, a court first attempts to give effect to the plain meaning of the words used in the ordinance. If the provision's meaning is plain on its face, there is no need for interpretation and effect will be given to the legislative body's plain meaning. To ascertain a provision's plain meaning, a court considers the ordinance as well as other provisions in the same code. Only when no plain, unambiguous meaning appears through this inquiry does the court resort to aids of statutory construction.

[8] **Municipal Corporations — Ordinances — Construction — Superfluous Provisions.** Municipal ordinances must be interpreted so that all the language used is given effect, with no portion rendered meaningless or superfluous.

[9] **Building Regulations — Building Permit — Conditions — Meet All Ordinance Requirements — Waivers and Setbacks — Effect.** A municipal ordinance that conditions the issuance of a building permit on the property owner's meeting "all requirements" delineated in the ordinance cannot be satisfied by a property owner for whom certain such requirements have been waived or set back when otherwise interpreting "meets all requirements" would render the phrase superfluous.

[10] **Building Regulations — Building Permit — Conditions — Meet All Ordinance Requirements — Waivers and Setbacks — Proof — Sufficiency.** In the absence of a definition of the term "waiver" in the code at issue, evidence that a property owner submitted an application for relief from certain land development requirements that the receiving agency labeled a "request for waiver," that the request was processed by a case manager who filed a "report form for waiver request" in support thereof, and that the request was granted by a decision maker who identified the application as one for "waivers" and "setbacks" is sufficient to support a finding that such requirements were waived.

[11] **Building Regulations — Building Permit — Conditions — Meet All Ordinance Requirements — Waivers and Setbacks — Alternate Means of Satisfying Requirements — Validity.** For purposes of a municipal ordinance that conditions the issuance of a building permit on the property owner's meeting "all requirements" delineated in the ordinance, a waiver or setback of a requirement does not constitute an alternate means of satisfying the requirement if the ordinance does not provide for alternate means.

[12] **Building Regulations — Land Use Regulations — Validity — Review — Standard of Review.** The constitutionality of a land use ordinance and the application of the ordinance in a particular case are reviewed de novo by an appellate court.

[13] **Building Regulations — Land Use Regulations — Vagueness — Test — In General.** A land use ordinance that provides fair warning and allows a person of common intelligence to understand its meaning is not unconstitutionally vague. The ordinance need not meet unreasonable standards of specificity to satisfy constitutional requirements.

[14] **Building Regulations — Land Use Regulations — Vagueness — Test — Particular Conduct.** In evaluating a vagueness challenge to a land use ordinance, a court analyzes the ordinance as applied to the particular facts of the case, not for facial vagueness.

[15] **Municipal Corporations — Ordinances — Validity — Preemption — Burden of Proof — Degree of Proof.** A duly enacted municipal ordinance is presumed to be constitutional and will not be invalidated unless the party making the challenge proves the ordinance to be unconstitutional beyond a reasonable doubt.

[16] **Building Regulations — Building Permit — Conditions — Meet All Ordinance Requirements — Vagueness — As Applied to Property Owner Who Received Waivers and Setbacks.** A municipal ordinance that conditions the issuance of a building permit on the property owner's meeting "all requirements" delineated in the ordinance is not unconstitutionally vague as applied to a property owner who has received waivers and setbacks in lieu of satisfying all requirements.

[17] **Building Regulations — Land Use Regulations — Vested Rights — Effect.** Under the doctrine of vested rights, a land use application is considered under the land use statutes and ordinances in effect at the time the application was submitted.

[18] **Building Regulations — Land Use Regulations — Vested Rights — Scope — Erroneous Interpretation of Law.** The vested rights doctrine does not permit a land use application to be considered according to a prior erroneous interpretation of a statute or ordinance in effect at the time the application was submitted.

[19] **Administrative Law — Judicial Review — Issues Not Presented to Agency — In General.** In general, a court reviewing an administrative decision will decline to consider issues not raised in the administrative proceeding, particularly with regard to issues involving highly fact-specific inquiries.

Nature of Action: A property owner sought judicial review under the Land Use Petition Act of a county board of health's denial of the owner's petition for a permit to build a sewage system on his property. Under county ordinances, the owner's lot is one-fourth the size normally required before the county will grant a permit and the county may grant a permit on an undersized lot only if the petitioner meets three criteria, including meeting "all requirements" other than the minimum lot size delineated in the ordinance. The board denied the owner's application for permit because he had received five waivers and setbacks with respect to certain requirements.

Superior Court: The Superior Court for Thurston County, No. 05-2-01587-7, Gary Tabor, J., on February 3, 2006, entered a judgment reversing the board's decision.

Court of Appeals: Holding that the ordinance does not allow the board to grant a permit on an undersized lot where the petitioner has received waivers and setbacks of applicable requirements and that the ordinance is not unconstitutional, the court *reverses* the judgment and *remands* the case for reinstatement of the board's denial of the application for a permit.

Allen T. Miller and Bruce D. Carter, for appellant.

Matthew B. Edwards (Owens Davies, PS), for respondent.

LEXIS Publishing™ Research References

2007 Wash. App. LEXIS 479

Annotated Revised Code of Washington by LexisNexis

¶1 QUINN-BRINTNALL, J. — The Thurston County Board of Health (Board) denied Jeff Griffin a permit to build an

on-site sewage system (OSS) on his Steamboat Island lot. Griffin's lot is one-fourth the size normally required before the Thurston County Public Health and Social Services Department (Department) will grant an OSS permit. The Department may grant an OSS permit on an undersized lot if the petitioner meets three criteria, including that the petitioner "meets all requirements" in the regulations other than the minimum lot size. THURSTON COUNTY SANTARY CODE (TCSC) art. IV, § 21.4.5.3. The Board denied Griffin's permit because he had received five waivers and setbacks. A superior court reversed. We hold that the "meets all requirements" provision governing the health officer's authority to issue an OSS permit to undersized lots excludes waivers and setbacks. Accordingly, we reverse the superior court's decision and remand with instructions that it reinstate the Board's denial of Griffin's permit.

FACTS

THE PROPERTY

¶2 Griffin owns a waterfront lot on Steamboat Island, an eight-acre island in Thurston County that has about 42 existing homes on 126 lots. Griffin's lot is vacant and undeveloped but is zoned residential. It is 2,850 square feet: 25 feet wide and 114 feet deep. Before Griffin purchased the property, his realtor warned him that the lot was too small for a septic tank permit and that Griffin would not be able to build a house on the property. Nevertheless, Griffin purchased the lot, applied for an OSS permit, and planned to build a small house.

HEALTH OFFICER

¶3 During his OSS permit application process, Griffin requested that he be relieved of the responsibility of complying with several setback and site requirements of the TCSC. Specifically, he requested (1) a waiver of the winter water table evaluation, (2) a waiver reducing the separation between the septic tank and pump chamber from 10 to 5 feet, (3) a horizontal setback between the disposal compo-

nent and building foundation from 10 to 2 feet, (4) a horizontal setback between the disposal component and adjacent property line from 5 feet, (5) a horizontal setback between the disposal component and the surface water from 100 feet to 75 feet, and (6) a reduction in the minimum design flow for a single-family residence from 240 to 120 gallons per day. Citing TCSC article IV, section 21.4.5, the health officer granted Griffin's six requests. The health officer indicated his belief that if an application met the criteria under TCSC article IV, section 21.4.5,¹ he was obligated to grant an OSS permit and he did so.

HEARING OFFICER

¶4 Several of Griffin's neighbors appealed the decision to the Department. The hearing officer held that section 21.4.5 was a *discretionary* provision and the health officer should not have granted a permit to Griffin because (1) minimum land area and density are significant health issues; (2) Griffin's lot is much smaller and more dense than the typical lot size and density; (3) the waivers and setbacks that Griffin received increased the health concern; and (4) thus, it is proper to take a conservative position on whether to exercise discretion and grant a waiver. The hearing officer also found that the health officer should not have waived the winter water study. The Department's hearing officer denied Griffin's permit.

¹ TCSC article IV, section 21.4.5 provides that the health officer may:

Permit the installation of an OSS, where the minimum land area requirements or lot sizes cannot be met, *only* when all of the following criteria are met:

21.4.5.1 The lot is registered as a legal lot of record created prior to January 1, 1995; and

21.4.5.2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection; and

21.4.5.3 The proposed system meets all requirements of these regulations other than minimum land area.

Clerk's Papers at 120 (emphasis added).

BOARD

¶5 Griffin appealed to the Board. Thurston County opposed Griffin's motion, and the interested parties cross-appealed.

¶6 The Board adopted the hearing officer's findings of fact, conclusions, and decision. But the Board apparently disagreed with the hearing officer's conclusion that the winter water study evaluation was erroneously waived. And the Board underlined the word "may" when it reprinted the ordinance, but it did not explicitly base its ruling on its discretionary authority to deny Griffin a permit under article IV, section 21.4.5. Instead, it held that the phrase "meets all requirements" in article IV, section 21.4.5.3 is not fulfilled if the petitioner is granted waivers and setbacks. It reasoned that the word "requirements," construed conservatively in order to protect the public's health, excludes waivers and setbacks.

¶7 One Board member dissented, saying that the phrase "all requirements" is ambiguous and that the Board should construe the statute in Griffin's favor because he complied with the health officer's requests. Through the other two votes, the Board affirmed the Department's permit denial.

SUPERIOR COURT

¶8 Griffin then appealed to superior court. He argued that the Board erred in its decision and that the ordinance is unconstitutionally vague and violated his vested and substantive due process rights. The superior court ruled orally:

I'm going to have to disagree with the County Commissioners or at least two of the three in this particular case. I do not find that that language, specifically the term "all requirements," means requirements without waiver. A requirement is a specific standard, and often for standards to apply there may be exceptions. A requirement or rule may still be met if there is an exception to the standard.

Report of Proceedings at 5. Although the superior court reversed the Board's decision, it found no merit in Griffin's

assertions that his constitutional rights were violated. Griffin appeals.

¶9 This appeal, filed under the Land Use Petition Act (LUPA), chapter 36.70C RCW, requires that we answer two questions: (1) does the plain language of the TCSC, article IV, section 21.4.5.1, allow the Board to grant an OSS permit on an undersized lot when the petitioner has received waivers and setbacks and (2) is the ordinance unconstitutional?

ANALYSIS

STANDARD OF REVIEW

[1, 2] ¶10 LUPA governs judicial review of land use decisions. RCW 36.70C.030. As all parties agree, at issue here is a "land use decision" governed by LUPA because Griffin appeals his "application for a project permit . . . required by law before [his] real property may be improved, developed, modified, sold, transferred, or used." RCW 36.70C.020(1)(a). When reviewing a land use decision, we stand in the same position as the superior court and review the administrative record that was before the Board. *Paulina v. City of Vancouver*, 122 Wn. App. 520, 525, 94 P.3d 366 (2004); *Citizens for Responsible & Organized Planning v. Chelan County*, 105 Wn. App. 753, 758, 21 P.3d 304 (2001). LUPA requires reversal of the Board's land use decision if the party seeking relief shows that:

- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; [or]

....

- (f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

[3-6] ¶11 Standards (b) and (f) present questions of law that we review de novo. 7 WASH. STATE BAR ASS'N, WASHINGTON REAL PROPERTY DESKBOOK § 111.4(9), at 111-25 (3d ed. 1996). Standard (c) concerns a factual determination that we review for substantial evidence. 7 WASHINGTON REAL PROPERTY DESKBOOK § 111.4(9), at 111-25.

¶12 "Substantial evidence" is evidence sufficient to convince an unprejudiced, rational person that a finding is true. *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002). On review, we weigh all inferences in a light most favorable to the party that prevailed in the highest forum that exercised fact-finding authority. Thurston County prevailed at the Department hearing, the highest forum with fact-finding authority, and thus we view all evidence and reasonable inferences in its favor.

CONSTRUCTION OF ORDINANCE

[7-9] ¶13 Under the ordinance here at issue, the health officer has discretion to permit an OSS installation *only* if three criteria are met. TCSC art. IV, § 21.4.5.1. Under the third criterion, the health officer has discretion to grant an OSS permit for a lot less than the minimum land size only if "[t]he proposed system meets all requirements of these regulations other than minimum land area." Clerk's Papers (CP) at 120. In reviewing this criterion, the Board excluded waivers and setbacks that landowners had received in evaluating whether small lots satisfied "all other requirements." The Board was correct.

¶14 Article IV, section 21.4.5 of the TCSC provides that the health officer may:

Permit the installation of an OSS, where the minimum land area requirements or lot sizes cannot be met, *only* when all of the following criteria are met:

21.4.5.1 The lot is registered as a legal lot of record created prior to January 1, 1995; and

21.4.5.2 The lot is outside an area of special concern where minimum land area has been listed as a design parameter necessary for public health protection, and

21.4.5.3 The proposed system meets all requirements of these regulations other than minimum land area.

CP at 120 (emphasis added).

¶15 Because Griffin's property was one-fourth of the minimum lot size required for the health officer to grant an OSS permit, the health officer could grant the permit *only* if the criteria in article IV, sections 21.4.5.1, 21.4.5.2, and 21.4.5.3 were satisfied. See TCSC, art. IV, § 21 tbl. VII at 4-58 (setting minimum lot size at 12,500 square feet, where Griffin's lot is 2,850 square feet).

¶16 When reviewing ordinances, we first attempt to give effect to the plain meaning of the words. If a provision's meaning is plain on its face, there is no need for interpretation and we give effect to the legislative body's plain meaning. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). To ascertain a provision's plain meaning, we examine the ordinance as well as other provisions in the same code. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). Only when no plain, unambiguous meaning appears through this inquiry do we resort to aids of statutory construction. *Campbell & Gwinn*, 146 Wn.2d at 12.

¶17 We must give effect to all provisions of an ordinance and may not interpret an ordinance in a way that renders a portion meaningless or superfluous. *Cobra Roofing Servs., Inc. v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 99, 135 P.3d 913 (2006). Under this principle, the "all requirements" portion of the ordinance at issue here cannot include "requirements" that have been waived or set back. If "all requirements" included waivers and setbacks, the language would be meaningless and superfluous. Every OSS petitioner, regardless of lot size, is required to comply with the TCSC's provisions or else obtain waivers and setbacks. Thus, the phrase is meaningful only if the application's sole deficiency is lot size. The Board properly construed the

ordinance to mean that an undersized lot must meet "all requirements" without waivers and setbacks in order to trigger the health officer's authority to exercise discretion and grant an OSS permit to an undersized lot.

SUBSTANTIAL EVIDENCE

[10] ¶18 We now review the finding that Griffin received waivers and setbacks for substantial evidence. Griffin asserts that the five variances that he received were not waivers but were, instead, "equivalent methods for achieving compliance with [the TCSC's] requirements." Br. of Resp't at 32-33. If Griffin did not receive waivers, the Board could not properly deny Griffin an OSS permit on the ground that the ordinance's "all requirements" provision was not fulfilled.

¶19 As used here, "waiver" is not a precise term of legal significance but, instead, is a term that the Department employs in common use. See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 923 (2d ed. 1995) (defining "waiver" as ordinarily meaning "the relinquishment of a legal right" but emphasizing that the word is often used as "an imprecise and generic term"). The Department labeled Griffin's applications "Thurston County On-Site Sewage-Systems Request for Waiver." Administrative R. (AR) at 18. In reviewing Griffin's applications, the case manager filed a "Report Form for Waiver Request." AR at 22. And the health officer similarly referred to the Department's actions as "waivers" and "setbacks." This evidence is substantial and supports the Board's finding that Griffin received waivers rather than meeting certain requirements. Thus, he did not fulfill the ordinance's third criterion: that he satisfy all requirements other than lot size.

[11] ¶20 Griffin also mischaracterizes the TCSC as allowing a petitioner to satisfy TCSC requirements via one of several equivalent methods. Griffin requested and received an abdication of the Department's authority to require him to submit a winter water study under TCSC article IV, section 11.4.1 as well as four reductions from the "minimum horizon-

tal separations" listed in TCSC article IV, section 10.1, table 1. The TCSC gives the Department discretion to waive these requirements, but it does not list equivalent methods of compliance. See TCSC art. IV, § 10.1, tbl. 1, § 11.4.1. Because Griffin mischaracterizes the TCSC's structure, his argument that waivers are alternate means of satisfying TCSC requirements fails. Griffin does not argue that he did not receive setbacks. He received both waivers and setbacks in lieu of satisfying TCSC requirements. Thus, the Board did not err when it concluded that the hearing officer lacked authority to grant Griffin an OSS permit for his undersized lot because Griffin did not satisfy all requirements except lot size. Because these issues are dispositive, we do not reach the remaining issues of whether the Board properly granted waivers and setbacks.

CONSTITUTIONALITY

[12] ¶21 Griffin cross-appeals and asserts three constitutional challenges to the TCSC under the doctrines of vagueness, vested rights, and substantive due process. We review de novo the constitutionality of a land use ordinance and decision. RCW 36.70C.130(1)(f). Griffin has not demonstrated that the TCSC is unconstitutional on its face or as applied.

VAGUENESS

[13-15] ¶22 Griffin first asserts that the TCSC is unconstitutionally vague. A land use ordinance that provides fair warning and allows a person of common intelligence to understand the law's meaning does not violate a party's constitutional rights. *Young v. Pierce County*, 120 Wn. App. 175, 182, 84 P.3d 927 (2004). Courts do not require an unreasonable standard of specificity, and we judge the ordinance as applied, not for facial vagueness. *Young*, 120 Wn. App. at 182. A duly enacted ordinance is presumed constitutional, and the party challenging it must demonstrate that the ordinance is unconstitutional beyond a reasonable doubt. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005).

[16] ¶23 Griffin has not met his burden to prove that the TCSC, article IV, section 21.4.5.1, is unconstitutionally vague. He argues only that (1) he would interpret the ordinance differently, (2) the Board previously interpreted the ordinance differently, and (3) he invested a lot of money because he believed the Board would grant him a permit. Initially, we note that Griffin's real estate agent told him that the property was too small to build on before he purchased it. Moreover, the provision "meets all requirements" allows a person of common intelligence to understand that a landowner who seeks an OSS permit for an undersized lot cannot receive waivers and setbacks in lieu of satisfying all requirements other than lot size. *Young*, 120 Wn. App. at 182. This reading of the plain language is consistent with long-standing principles of statutory construction. See *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999). The ordinance is not vague.

VESTED RIGHTS

[17, 18] ¶24 Griffin next challenges the ordinance's application under the vested rights doctrine. "Vesting" refers generally to the notion that an agency may consider a land use application only under the statutes and ordinances in effect when the applicant submitted his application. *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994). Griffin asserts that because the Board previously interpreted the TCSC, article IV, section 21.4.5.1, differently, he had a right to rely on its continued erroneous interpretation of the ordinance and that, therefore, the Board violated his vested rights. But the vested rights doctrine relates to implementing new laws, not correcting a misinterpretation of existing law. See *Friends of the Law*, 123 Wn.2d at 522. TCSC article IV, section 21.4.5.1 was not only in effect when Griffin submitted his land use application, it was in effect when he bought the property with notice that it was unbuildable. The vested rights doctrine does not apply in the manner Griffin suggests.

SUBSTANTIVE DUE PROCESS

[19] ¶25 Last, Griffin claims that the Board violated his substantive due process rights. Generally, an issue not raised in a contested case before the Board may not be raised for the first time on review of the Board's decision. *Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 201 n.4, 884 P.2d 910 (1994). Substantive due process analysis is highly fact specific. See *Guimont v. Clarke*, 121 Wn.2d 586, 608-09, 854 P.2d 1 (1993), cert. denied, 510 U.S. 1176 (1994). Griffin did not raise this issue before the Board, and without a full factual development on the record, we cannot fairly address this claim. Thus, Griffin waived this claim. Accord *Buechel*, 125 Wn.2d at 201 n.4.

¶26 Reversed and remanded.

BRIDGEWATER and PENOVAR, JJ., concur.

[No. 34529-3-II. Division Two. March 20, 2007.]

THE STATE OF WASHINGTON, *Respondent*, v. B.J.S.,
Appellant.

The opinion in the above captioned case, which appeared in the advance sheets at 137 Wn. App. 622-33, has not been published in this permanent bound volume pursuant to an order of the Court of Appeals dated August 7, 2007 withdrawing the opinion, denying reconsideration, and substituting a new opinion. See 140 Wn. App. 91.

THE NEXT PAGE IS NUMBERED 633.

[Nos. 24464-4-III; 24800-3-III; Division Three. March 22, 2007.]
24613-2-III.

JEFF LASCHEID, *Respondent*, v. THE CITY OF KENNEWICK,
Appellant.

[1] Trial — Taking Case From Jury — Sufficiency of Evidence — Judgment as a Matter of Law — Review — Standard of Review. The propriety of a trial court's denial of a motion for judgment as a matter of law is a question of law that is reviewed de novo.